JUL 30 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.
No. 290

GILBERT GRABLE, LOUISE GRABLE, Trustees,
and
DONALD L. GRABLE, Administrator,
Defendants and Appellants,
vs.
FLOYD BURNS and LAURA B. BURNS,
Plaintiffs,
and
THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, IN AND FOR THE FOURTH APPELLATE DISTRICT, SAN BERNARDINO SECTION,
Appellees.

Motion for Permission to File Writ of Certiorari to the Honorable Earl Warren, Chief Justice, and to the Associate Justices of the Supreme Court of the United States.

and

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Fourth District, San Bernardino Section.

GILBERT GRABLE,
LOUISE GRABLE,
DONALD GRABLE,
In Propria Persona.
801 Main Street (Box 38),
Highgrove, California,

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Plaintiffs,
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THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, IN AND FOR THE FOURTH APPELLATE DISTRICT, SAN BERNARDINO SECTION,
Appellees.

Motion for Permission to File Writ of Certiorari to the Honorable Earl Warren, Chief Justice, and to the Associate Justices of the Supreme Court of the United States.

Comes now the defendants-appellants, and make their motion that permission be granted to file their petition for a writ of certiorari as authorized by 28 U. S. C. A., Section 1651(a) in the above entitled action.

Dated: 11th day of July, 1956.

GILBERT GRABLE, Trustee,
LOUISE GRABLE, Trustee,
DONALD L. GRABLE, Administrator,
In Propria Persona.

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Defendants and Appellants,

vs.

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Plaintiffs,
and
THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, IN AND FOR THE FOURTH APPELLATE DISTRICT, SAN BERNARDINO SECTION,
Appellees.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Fourth District, San Bernardino Section.

Petitioners, Gilbert Grable, Louise Grable, and Donald Grable, pray that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of the State of California, Fourth Appellate District, San Bernardino Section thereof, entered on January 4, 1956 [Certified Record, Opinion Fourth District Court of Appeal, p. 1; fourth Petition for Hearing in the Supreme Court, last 2 pages of Certified Record; Appendix, p. 1] whereby judgment of the Superior Court of the State of California, in and for the County of San Bernardino, was affirmed.

Opinions Below.

The opinion of the Court below, District Court of Appeal of the State of California, in and for the Fourth Appellate District, San Bernardino Section, affirming the judgment of the Superior Court of the State of California, in and for the County of San Bernardino [Certified Record, Opinion of Fourth District Court of Appeal, p. 1; Appendix, p. 1]. The Opinion is reported in 138 Advanced California Appellate Reports 330.

A petition for rehearing in the District Court of Appeal on the opinion sustaining the judgments against your petitioners was denied January 27, 1956 (138 Advanced California Appellate Reports, No. 5, in the minutes thereof at p. 6); four petitions were filed in the Supreme Court of the State of California seeking a rehearing; all were denied, the fourth and last being denied May 9, 1956 (46 Advanced California Reports No. 18 in the minutes thereof at p. 2).

Jurisdiction.

The judgment of the District Court of Appeal was entered January 4, 1956 [Certified Record, Opinion Fourth District Court of Appeal, p. 1; Appendix, p. 1].

A petition for rehearing was denied January 27, 1956 (138 Advanced California Appellate Reports, No. 5, in the minutes thereof at p. 6).

The fourth petition for hearing in the Supreme Court of California was denied May 9, 1956 (46 Advanced California Reports No. 18, in the minutes thereof at p. 2).

The Constitutional issues here presented were urged in the lower court. The jurisdiction of this court is invoked under Section 1257(3) of the Judicial Code, as amended.

Questions Presented.

The judgment quieted title in plaintiffs [Certified Record, Opinion Fourth District Court of Appeal, pp. 1, 8; Appendix, pp. 1, 11].

The District Court of Appeal in its opinion held that the trial court did not rule on petitioner's motion to abate the action due to the decision and order to account rendered in a previous action in the Superior Court of the State of California, in and for County of Los Angeles [Certified Record, Affidavit in Support of Oral Motion to Abate Action; Opinion, pp. 4, 5, 10, 11, 14, 18; Appendix, pp. 3, 4, 10, 13].

The District Court of Appeal in its opinion held that the trial judge did not rule on the motion for nonsuit [Certified Record, Opinion District Court of Appeal, p. 8; Appendix, p. 6].

The District Court of Appeal in its opinion states that defendants apparently made no objections to the trial court whereby the trial judge's attention might have been called to appellants' objections [Certified Record, Opinion District Court of Appeal, p. 9; Appendix, p. 6].

Objections were filed by both the administrator and the trustees to the proposed findings of fact and conclusions of law.

The trial court refused to rule on the validity of the instruments in evidence before it [Certified Record, Opinion District Court of Appeal, p. 8; Appendix, p. 4].

The trial court refused to act on the evidence showing that the plaintiffs each had notice in time to have entered the Los Angeles action in time before the action came on for trial. That they were invited by the trustees to join

the suit and refused [Certified Record, Affidavit in Support of Oral Motion to Abate Action, Exhibit "B" therewith, Opinion District Court of Appeal, pp. 14, 18; Trustee-Appellants' first petition for hearing in the Supreme Court of State of California, p. 17; Appendix, pp. 10, 13].

The questions presented are:

(1) Whether the Minute Order decision and order to account, was a final decision of the Los Angeles Court as to the validity of the Trust, and for lack of appeal became a final judgment of the status of the Trust, and the order thereby to account, was an order to all persons holding any right, title or interest in trust property whether in possession or not, as resulting defendant trustees to surrender up for cancellation all instruments evidencing such right, title or interest, and make an accounting to the Court for any gains that they would owe the Grantor as required by law.

(2) Whether a party has knowledge, constructive or actual, of the action *in rem* wherein he has an interest, and refuses to join the action or prosecute an appeal from a judgment therein, he is a party to the action and bound by the decision and order made therein.

(3) Whether a title insurer who joins the transferee and the trustee in a breach of trust is a party to the action where it has notice of the action, and is it liable to the Grantor for the property and the gains thereon.

(4) Whether the insurer and the insured under the insurer's right of subrogation, in the eyes of the law is one and the same party in an action concerning the validity

of the title covered by the insured's policy of title insurance, and is notice to one, notice to both.

(5) Whether the San Bernardino Court has jurisdiction over the action to quiet title, when the Los Angeles Court had ordered the Grant Deed up to be cancelled as void, and the time had run for appeal so decision was finally adjudicated as to said invalidity.

(6) Whether the quitclaim title obtained by the title company in the name of plaintiffs, defeats the grantor's right to return of the property, as a matter of law and public policy.

(7) Whether a court can render a judgment while the action is under submission on a motion for nonsuit.

(8) Whether a court can ignore the issue before it for decision in a judgment.

(9) Whether the Appellate Court can ignore the errors, omissions and discriminatory results of the trial court's judgment in its review.

(10) Whether an opinion and affirmation of the District Court of Appeal, which is evasive, ambiguous, and indecisive, as to the issues for decision, is valid.

(11) Whether the Supreme Court of the State of California can refuse to review a case over which, by the Constitution of the State, it has original jurisdiction.

(12) Whether the Supreme Court of the United States can examine the facts in a case up for review on a Writ of Certiorari.

(13) Whether the Supreme Court of the United States can make a final decision on the merits of the case for the Supreme Court of the State to execute.

(14) Whether the insured can rescind a contract of assignment of insurance where the assignee sues defendant when invalidity occurs.

(15) Whether a Constitutional and statutory right conferred on a private party by the state, affecting the public interest will be denied by a court, if to deny the right, contravenes the Constitutional and statutory policy of the state and the substantive law of the United States.

The Questions Sought to Be Reviewed Arise Under the Constitutional Provisions, and Statutes, Which the Case Involves.

Fourteenth Amendment, Section 1, of the Constitution of the United States; U. S. C. A., Constitutional Amendments 14 to end, Part III, at page 2:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U. S. C. A., Section 1652, page 110:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c/646, 62 Stat. 944."

Under the Above Section 1652, the California Constitutional Articles and Statutes Which Apply to This Case Are Herewith Set Forth.

Article XX, Section 9, Constitution of State of California, Vol. 2, Mason's California Constitution, page 607:

> "No perpetuities shall be allowed except for eleemosynary purposes."

Rule 2 on Rules of Appeal for the State of California, Deering's California Code of Civil Procedure, appendix, page 5:

> (a) "Except as otherwise specifically provided by law, notice of appeal shall be filed within 60 days from the date of entry of the judgment, unless the time is extended as provided in Rule 3."
>
> (b) "For the purposes of this rule: (1) The date of entry of a judgment shall be the date of its entry in the judgment book. (2) *The date of entry of an appealable order which is entered in the minutes shall be the date of its entry in the permanent minutes, unless such minute order as entered expressly directs that a written order be prepared, signed and filed, in which case the date of entry shall be the date of filing of the signed order.* (3) The date of entry of an appealable order which is not entered in the minutes shall be the date of filing of the order signed by the court. (4) The date of entry of a decree of distribution in a probate proceeding shall be the date of its entry at length in the minutes." (As amended, effective Jan. 1, 1951.) (Emphasis ours.)

Deering's California Code of Civil Procedure (1953), Section 581-(c), page 270:

> "After the plaintiff has completed his opening statement or the presentation of his evidence, the defen-

dant, WITHOUT WAIVING HIS RIGHT TO OFFER EVIDENCE IN THE EVENT THE MOTION IS NOT GRANTED, may move for a judgment of nonsuit. If the motion is granted, unless the court in its order for judgment of nonsuit otherwise specifies, such judgment operates as an adjudication upon the merits." (Emphasis ours.)

Deering's California Code of Civil Procedure (1953), Section 1908, page 741:

"The effect of a judgment or final order in an action or special proceeding before a court or judge of this state or of the United States having jurisdiction to pronounce a judgment or order, is as follows:

1. IN CASE OF A JUDGMENT OR ORDER AGAINST A SPECIFIC THING, * * * THE JUDGMENT OR ORDER IS CONCLUSIVE UPON THE TITLE TO THE THING."

2. "In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, *provided they have notice, actual or constructive, of the pendency of the action or proceeding.*" (Emphasis ours.)

Deering's California Code of Civil Procedure (1949), Section 1689, page 297, Where a Party May Rescind:

"The party to a contract may rescind the same in the following cases only:

Subsection 2: If, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part.

Subsection 4: If such consideration, before it is rendered to him fails in a material respect, for any cause."

Summary Statement of Matters Involved.

The petitioners, Gilbert Grable, Louise Grable and Donald Grable, by a memorandum of decision and order, made in the Superior Court of the State of California, in and for the County of Los Angeles [Certified Record, Ex. "B," Affidavit in Support of Oral Motion to Abate Action], wherein the Sidney L. Beach Trust was found void for violating the Rule Against Perpetuities, and the defendant trustees are ordered to make accounting, as a result of said decision and order, were charged with the duty of recovering all of the property for the Estate of Sidney L. Beach, deceased.

The action wherein this ruling was made, is by its nature, an action *in rem* to determine the status of the said Sidney L. Beach Trust [Certified Record, Opinion 4th District Court of Appeal, p. 5], and if found void to cancel said trust and order an accounting as to the validity of all claims to trust property in whomsoever hands said property might be, and wheresoever located.

That the court could approve the accounting made by the defendant constructive trustees, *(created by the decision that the said Sidney L. Beach trust was void for illegality)*, that the probate of the Beach Estate might be closed.

The decision became final on the 5th day of January, 1954, for want of appeal within sixty days after the entry of said decision on November 5, 1953 [Certified Record, Ex. "B" with Affidavit in Support of Oral Motion to Abate Action].

The Administrator, *acting on the authority of the Court to order the trust dissolved where it is void for illegality*, served a notice and demand on the plaintiffs, Floyd Burns and Laura Burns, for return of the property they held

as resulting trustees for the Sidney L. Beach Estate. The Security Title Insurance Company, as the real parties in interest under their right of subrogation, filed the action here sought to be reviewed, as a reply to said notice and demand.

The petitioners, Gilbert Grable, Louise Grable, and Donald Grable, before and continously during the trial, urged the Court to recognize the judgment of the Los Angeles court. The plaintiffs both in fact and in interest were parties to the action [Certified Record, Affidavit in Support of Motion to Abate Action, p. 3] which being an action *in rem*, was binding on all parties who held trust property, and, with notice of the Los Angeles action, refused to join said action or prosecute an appeal from the decision of the trust invalidity therein, and the order to account to the court for all trust property under their control either directly or indirectly, in their possession or out of their possession was in effect, an order to deliver up for cancellation all instruments evidencing any right, title or interest in said trust property and to make to the court an accounting of all gains made on said trust property while under their control as presecribed by law. [Certified Record, Opinion District Court of Appeal, pp. 10, 11; Appendix, p. 8.]

The Trial Court and the District Court of Appeal continuously refused a determination on the finality of the judgment and validity of the order to account made by the Los Angeles Court, on the grounds that the plaintiffs, Floyd Burns, Laura Burns, and the Security Title Insurance Company were not parties to the action, and, therefore, not bound by said decision and order, [Certified Record, Opinion District Court of Appeal, pp. 14, 18; Appendix, pp. 10, 13] and that the San Bernardino Court had jurisdiction to proceed with the case.

The petitioners, herein, at the close of plaintiffs' case made a motion for nonsuit, to obtain a positive decision on the validity of the instruments before the court which included the decision of the Los Angeles Court. Said motion was granted [Certified Record, Opinion District Court of Appeal, pp. 6, 7; Appendix, pp. 4, 5, 6.]

Thereafter, without ruling on the motion for nonsuit or the validity of the instruments, the court made its opinion and judgment. [Certified Record, Opinion District Court of Appeal, p. 8; Appendix, p. 6.]

Objections, were filed with the court to the findings of fact and conclusions of law, and as to the irregularity in the proceedings.

Whereby, the defendants were denied the due process of law and equal protection under the law. The Court made no reply and filed the judgment in the action.

An appeal was filed in the District Court of Appeal from the opinion and affirmance of the judgment of the trial court.

The District Court of Appeal, like the Trial Court, makes no decision on the issues before it, and is so ambigous, irresponsible, and disconnected, in its deliberations pro and con as to the possible theory upon which the Trial Court might have acted, arriving at no definite conclusion of its own on the subject before it, constitutes no final decision upon which petitioners would be safe to proceed in executing the order of the Los Angeles Court to dissolve the Trust, and is a denial of the due process of law and the equal protection under the law.

The action of the Supreme Court in denying a hearing in this matter is also a denial of due process of law, and equal protection under the law.

ARGUMENT.

The judgment of the Courts below should be reversed for the following reasons:

I.
Battle of the Courts.

There was a denial of due process of law and equal protection under the law, in the denial by the trial court and the District Court of Appeal, of the finality of the decision and order of the Los Angeles Court, and proceeding to trial with an action over which they had no jurisdiction, over the parties, the cause, or the *res.* (Calif. Code of Civ. Proc., Sec. 1908 (1) (2); Rule 2, Calif. Rules on Appeal; amended.)

II.
Ignorance Is No Excuse in Law.

There was a denial of due process of law and equal rights under the law, where the courts refused to recognize the fact, that a party with actual knowledge, of an action *in rem* in which he holds an interest, is a party to said action and failure to join the action or prosecute an appeal from a decision therein binds him to the issues decided in that decision, *and he has had due process of law and equal protection of the laws.*

The Mary, 13 U. S. 9 Cranch 126, 144 L. Ed. 3:628 at p. 685.

III.

Injury Through Negligence to a Third Party Is a Liability of the Parties to the Act Causing the Injury.

The title company participating in the breach of trust with notice of the breach is fraud against the Grantor.

Restatement of Trusts, Sec. 326;

Grogan v. Metz, 138 A. C. A. No. 4, at p. 791 (4), (6), (9), (10).

IV.

Parties Joined in a Single Interest May Have but One Attorney.

In this action the attorneys are on the staff of the Security Title Insurance Company, and receive no compensation from the plaintiffs, Floyd Burns or Laura Burns, yet all notices are made to them.

V.

Illegality Begets Illegality.

The Grant Deed to plaintiffs from the trustees is void, being dependent on the void trust for its existence.

1 *C. J. S.*, p. 944, Sec. 1, Classification F, Sub. 6;

Sakuma v. Zellerbach Paper Co., 25 Cal. App. 2d 309, at p. 320.

VI.

Transactions in Fraud Are Void.

The title company and the Grantor, Irwin Clark, involved in the quitclaim title to defraud the Sidney L. Beach Estate of trust property, *are equally liable with*

plaintiffs Floyd Burns and Laura Burns to the Estate for any loss to said estate.

Restatement of Trusts, Sec. 326;
Grogan v. Metz, supra.

VII.

Decisions Made in Violation of the Procedural Practice Are Void.

Where a court has before it a motion for nonsuit for decision, it has no authority to render a judgment in the action.

Calif. Code Civ. Proc., Sec. 581-C.

This is a violation of the due process of law.

VIII.

Court's Duty to Determine Rights of Parties to Action.

Where a court ignores the issue before it for decision, or renders a conflicting and evasive decision, it is a denial of the due process of law to the party adversely affected.

IX.

Appellate Courts Supervise, Review and Correct Lower Courts.

Where the Appellate Court ignores the error, omission, and discriminatory results of the trial Court's judgment in its review, it is a denial of due process of law to the injured party to the action.

X.

A Final Decision Must Decide All Issues Between Parties.

An opinion and judgment of any court which does not decide the issues before it and state its decision clearly and in such a manner that it permits of only one interpretation, is void for denying the due process of law to the parties to the action.

XI.

Supreme Court of the State of California Bound to Duties Imposed by Constitution of State.

Where, under the Constitution of the State of California, jurisdiction of an action on appeal is vested in the Supreme Court of California, and said Court transfers said case to the District Court of Appeal for review, if it is contended that the case in the opinion is at variance materially with record, the Court will review it, and a refusal so to do is a denial of due process of law.

Burke v. Maze, 10 Cal. App. 206, 211;

In re O'Connell, S. F. 11955, S. Ct. Cal., Oct. 28, 1926, 250 Pac. 390.

XII.

Supreme Court of the United States, Guardian of the Private Rights of the People.

It is fundamental to the doctrine of due process that no court shall deprive any party of a substantive right arbitrarily or capriciously. This Court has been zealous in examining the records of litigation carried on in State courts where there is a showing that a reasonable basis

exists for supposing that rights guaranteed by the Federal Constitution have been denied or ignored.

Dixon v. Duffy, 344 U. S. 143, 145 (1952);
Jennings v. Illinois, 342 U. S. 104 (1951).

In *Craig v. Harney*, 331 U. S. 367, 373 (1946), this Court said:

> "In a case where it is asserted that a person has been deprived by a state court of a fundamental right secured by the Constitution, an independent examination of the facts by this court is often required to be made. (Citations.)"

XIII.

Supervision of State Courts by Supreme Court of the United States.

The Supreme Court in its supervisory capacity, can render its own decision, on examining the facts and remand it back to the State Court for execution.

XIV.

A Contract of Assignment Is Separate From Contract of Insurance.

Where a contract of insurance is assigned to another as liquidated damages in event of invalidity, to protect the insured from litigation, and a suit is filed by the assignee against the assignor, such action constitutes a breach of contract and allows rescission.

Calif. Code Civ. Proc., Sec. 1689.

XV.

A Private Right for Public Policy.

A violation of the Rule Against Perpetuities in an express trust is void, and the right of the Grantor to recover his property with its fruits is a private right granted to

the Grantor in the interest of public policy, which the courts are required to enforce, as to the recipient, as well as to those who suffer a loss, *and the failure of the court to do so is a violation of the rights of society to protection under the laws.*

Brooklyn Bank v. O'Neil, 324 U. S. 697, at p. 704.

Conclusion.

Wherefore, your petitioners pray:

That this Court issue a Writ of Certiorari to the District Court of Appeal of the State of California in and for the Fourth Appellate District, San Bernardino Section thereof, and that the judgment be reversed, to the end that these petitioners may have the judgment in the action here submitted for review void for lack of jurisdiction in the trial court.

That the Sidney L. Beach Trust be found wholly void for violating the Rule Against Perpetuities.

That the decision and order in the Los Angeles Court be found a final adjudication of the Trust invalidity for violation of the Rule Against Perpetuities.

That the order to account to the court is final and binding on all persons who had actual or constructive notice under the law, of the action in the Los Angeles Court in time to have entered said action before decision, or to have prosecuted an appeal therefrom, and who have or have had property of Sidney L. Beach in their possession or under their control, where said right of possession or control was derived through and was dependent upon Sidney L. Beach Trust for its existence.

That all parties with notice who participated in any transaction wherein trust property was transferred or

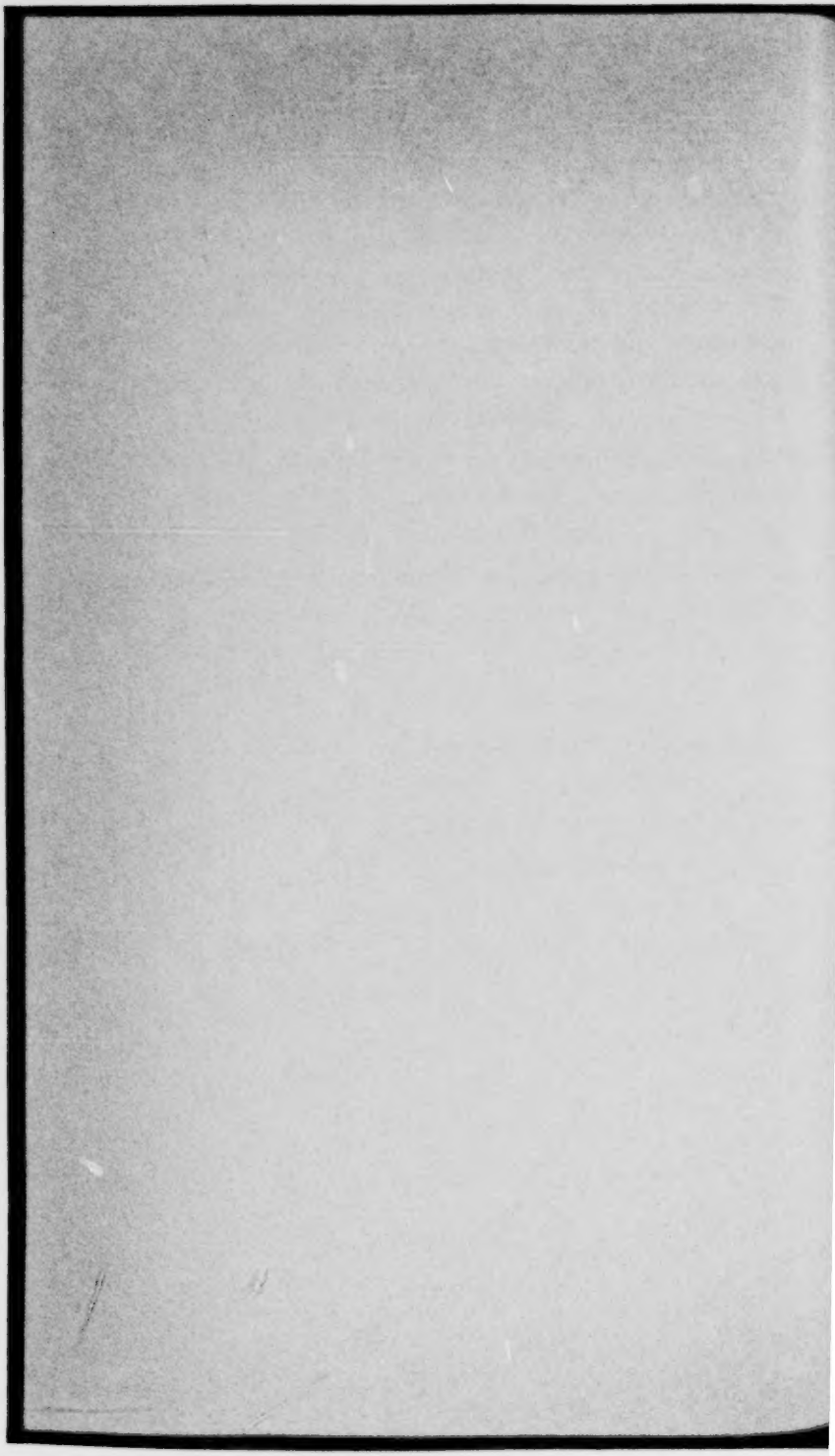
encumbered by the trustees in breach of trust, whether transferee, Title Insurance Company, encumbrancer, or in any other capacity, is liable to the Grantor for any loss, either of the property or the gains thereon, and is subject to the order of the Los Angeles Court to account for the gains, and, surrender up for cancellation any instruments by which they claim any right, title, or interest in the property of the Sidney L. Beach Estate.

That said order to account shall be immediately executed before the Los Angeles Court wherein lies the jurisdiction to complete the action and close the case.

That the rights of the petitioners under the Constitution of the United States shall be enforced and the ends of justice be met.

Respectfully submitted,

GILBERT GRABLE, Trustee,
LOUISE GRABLE, Trustee,
DONALD GRABLE, Administrator
In Propria Persona.



APPENDIX.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Fourth Appellate District.

F. L. Burns and Laura B. Burns, Plaintiffs and Respondents, vs. Donald L. Grable, individually and as administrator with the Will annexed of the Estate of Sidney L. Beach, deceased, G. W. Grable and Louise Grable, husband and wife, individually and as trustees of the Sidney L. Beach Trust, *et al.*, Defendants and Appellants Civil No. 5241.

Filed January 4, 1956.

Appeal from a decree of the Superior Court of San Bernardino County in a quiet title action. Archie D. Mitchell, Judge. Affirmed.

For Appellant Adminstrator—Russell H. Reay.

For Appellants Grable, individually and as trustees—G. W. Grable and Louise Grable, in propria persona.

For Respondents—F. W. Audrain and S. Rex Lewis.

Plaintiffs and respondents, F. L. Burns and wife brought this action against defendants and appellants Donald L. Grable, individually and as administrator of the estate of Sidney L. Beach, deceased, and G. W. Grable and Louise Grable, husband and wife, individually and as trustees of the Sidney L. Beach trust, to quiet title to two lots in San Bernardino County, and allege that they were the owners and in possession thereof and that defendants and appellants claim some right, title and interest therein. The prayer is that it be adjudged and decreed that plaintiffs are the owners thereof; that their title is good and valid and that defendants be barred from as-

serting any title thereto. There is a general prayer for equitable relief.

Defendant Donald L. Grable, individually and as administrator, filed a separate answer, denied generally the allegations of the complaint, and as a separate defense alleged that one Sidney L. Beach was the owner of the described property and that by his demise his estate became the owner thereof and that the property was then being held by defendants G. W. Grable and wife as trustees under said trust conveyed this property by grant deed to plaintiffs herein in violation of its terms and without right or authority, and that plaintiffs were fully aware of this fact. In conjunction therewith they filed a cross-complaint against plaintiffs and G. W. Grable and Louise Grable, as trustees alleging these facts and claim that plaintiffs hold title to said property only as involuntary trustees for the estate of Sidney L. Beach, deceased. The prayer is that it be so declared and that plaintiffs be compelled to reconvey the property to said estate and to quiet title against plaintiffs.

Defendants G. W. Grable and Louise Grable, by answer to the cross-complaint, deny that they ever were trustees of said trust, because said trust was invalid. Accordingly they claim that they had no authority to transfer said property to the plaintiffs and were therefore resulting trustees only for the estate of Sidney L. Beach; that the trust instrument was recorded in San Bernardino County in 1950, and plaintiffs took such property with full notice of the invalidity of the trust. They pray that title to said property be transferred to them as such resulting trustees. By way of cross-complaint they allege that cross-defendant Security Title Insurance Company insured plaintiffs as beneficiaries in a title policy in the

sum of $12,500, the sale price of the property; that since the title to the property in plaintiffs is invalid that it be decreed said resulting trustees be declared to be beneficiaries thereunder; and that judgment be entered in their favor against said title company for $12,500.

By way of answer to this cross-complaint it is alleged by plaintiffs that the trustees are estopped from denying plaintiffs' title to said property and from claiming that title thereto did not pass to plaintiffs by virtue of their grant deed. In answer to the cross-complaint of Donald L. Grable, individually and as administrator, plaintiffs allege that he is barred from asserting any defense to this action by reason of the statute of limitations (Sec. 338, par. 4, Code Civ. Proc.) and that he is estopped from denying the authority of the trustees to perform acts under the said trust for several reasons and particularly because he ratified previous acts of the trustees and accordingly may not disaffirm certain acts unfavorable, and ratify others which are favorable to said trust estate.

On August 27, 1954, the court denied a motion of the trustees for judgment on the pleadings. On December 29, 1954, G. W. Grable filed an affidavit in support of his oral motion to abate the action predicated upon the ground that Sidney L. Beach, on June 5, 1952, filed an action in the Superior Court of Los Angeles County in which he sought declaratory relief as to whether a written trust created by him was valid or invalid, and for an accounting of the trustees, if it was held to be invalid. It is averred that G. W. Grable, his wife and the beneficiaries under the trust were joined as parties in said action; that after the hearing, the trial court signed a memorandum of its ruling stating that "The court is

prepared to hold that the trust involved is invalid for the reason that it violates the rule against perpetuities . . . The trust will therefore be dissolved and defendant trustees ordered to make accounting." Before this decision Beach died, Grable was appointed administrator, and was substituted in said action.

On December 30, 1954 this action came on for trial and the judge granted a motion of attorney Reay to "abate the cross-complaint pending determination upon further action." (The effect of this order is not clear to us.) The further trial of the action was continued to January 6, 1955, and at that time defendant G. W. Grable testified under section 2055 of the Code of Civil Procedure. Certified copies of the declaration of trust, grant deed, escrow instructions, and other documents were received in evidence without passing judgment on their validity. A grant deed dated September 13, 1949, was received in evidence as defendant Donald Grable's exhibit. Other witnesses were called by plaintiffs and after certain stipulations of fact between counsel, plaintiffs rested their case. Some confusion exists as to whether defendants and appellants then submitted the entire case for decision or were, as claimed by the appellants for the first time in their briefs on appeal, merely presenting a motion for non-suit and later expected to produce further evidence. Before proceeding further we will set forth the record pertaining to the motion after plaintiffs rested their case. The reporter's transcript reflects the following dialogue between the court and counsel for defendants and appellants, and G. W. Grable and his wife, who were then and at all times, appearing in propria persona:

"Mr. Reay: Your Honor, I don't beleive that the defendant administrator has any evidence to introduce. I believe it is just a question of the legality of the documents

before this Court, so I am going to move for a judgment on behalf of the defendant administrator. I am willing to submit that, Your Honor.

"Mr. Grable: I agree with that, Your Honor.

"The Court: Very well, do you make the same motion?

"Mr. Grable: Yes, sir.

"The Court: . . . I may have involved him in something he didn't intend. You make the same motion on behalf of yourself, is that it?

"Mr. Grable: Yes.

"The Court: Rather than—a motion was made by Mr. Reay with respect to the administrator and now you are making the motion with respect to yourself?

"Mr. Grable: That is correct.

"The Court: And your wife too; is she a party?

"Mr. Grable: Yes, that is correct.

"The Court: Very well.

"Mr. Reay: May I also make a motion for non-suit too—I think that would better protect the rights of the plaintiff, whatever equities the plaintiff might have in this case. I think we would prefer to make a motion for non-suit, Your Honor.

"The Court: Very well.

"Mr. Reay: I might make a preface then with this remark, Your Honor: I believe there is equities in this case, but I don't believe the plaintiff has filed the proper proceedings before this Court to get those equities before Your Honor, and I therefore would change to a motion for the non-suit.

"The Court: Very well. You want to make the same motion, Mr. Grable?

"Mr. Grable: Yes, the same motion."

Thereafter, briefs were submitted and on February 17, 1955, a minute entry was made: "In the above entitled action, heretofore submitted, the court now makes the following ruling and written opinion: Judgment for plaintiff." There was no direct statement in the record that the trial judge ruled on the motion for nonsuit. However, the inference must be that he denied it because he filed a written memorandum opinion on February 17, 1955, setting forth in general terms his reason for entering judgment for plaintiffs quieting their title to the property. Otherwise, had a judgment of nonsuit or dismissal been granted in favor of defendants no such findings would have been necessary. (9 Cal. Jur. p. 565, Sec. 40.) On March 4, 1955, he signed written findings reciting that the "cause" came for "trial" on January 6, 1955, and the parties were personally present or represented by counsel; that "trial" of the cause was "duly had and evidence both oral and documentary was received, and all things having been duly presented to the court, the court now makes the following findings of fact." Thereafter, the court concluded that plaintiffs were the owners of the property and defendants had no right to it. A decree was entered accordingly. Defendants appeal from the decree. No motion for new trial was made and apparently no objections were made in the trial court whereby the trial judge's attention might have been called to the claim which appellants now make for the first time on appeal that the trial judge was only ruling on motion for nonsuit. Ordinarily, objections to failure of the court to receive evidence at the trial should not be urged for the first time on appeal. (Hession vs. City and County of San Francisco, 122 Cal. App. 2d 592, 605.) From the record it might well be understood that the trial court believed, as stated by counsel and acquiesced in by defendants, that even though the

nonsuit should not be granted, the parties had no further evidence to offer, and that "It is just a question of the legality of the documents before this court."

The facts shown were that G. W. Grable and Louise Grable were appointed trustees in a declaration of trust dated September 15, 1949, and recorded in San Bernardino County February 20, 1950; that on April 5, 1950, while they were acting as trustees under the Sidney L. Beach trust, they purported to purchase the herein concerned real property from one Clark and wife naming the "Sidney L. Beach Trust" therein as grantee; that at that time they, as trustees, executed a purchase money deed of trust in favor of the Clarks in the sum of $11,000; that they, as trustees then purported to sell that real property to the plaintiffs by grant deed for the sum of $12,500; and that $11,319.31 of this money was used to pay the balance due on the purchase money deed of trust from the escrow involved in this transaction. It also appears that when the validity of the trust and accordingly the grant deed involved herein arose, plaintiffs, to perfect their record title also obtained a quitclaim deed from the Clarks, predicated upon the claim that if the Sidney L. Beach trust was invalid and no authority was vested in the trustees to convey the property here involved, there was likewise no authority in said trust or trustees to be named the grantee under the Clark grant deed, and accordingly, that deed being void, plaintiffs acquired title from the Clarks under this quitclaim deed.

Defendants further contend that the trust agreement conclusively shows, upon its face, that it is invalid for the reasons expressed; that the trustees thereunder were, accordingly, without power or authority to execute the grant deed here involved and that under the decisions it was

void; that a resulting trust is presumed; that by recording of the trust agreement, as alleged, plaintiffs had constructive notice of its invalidity; that Grables had a vested right to the money due on the policy of title insurance; that the Los Angeles court, under the comity rule, was vested with exclusive jurisdiction to determine in that action the rights of all parties involved pertaining to the validity of the trust; and that the defense of estoppel is not applicable under the facts existing. In support of these contentions they cite such authorities as Frink v. Roe, 70 Cal. 296, 313; Secs. 1213 and 2243 Civil Code; 14 Cal. Jur. p. 531, sec. 86; Cutting v. Bryan, 206 Cal. 254; Wood v. American National Bank, 125 Cal. App. 248; and 41 Am. Jur. p. 107, sec. 65.

G. W. Grable testified that all of his acts in dealing with the property were performed in good faith and were based on the assumption that he had full authority to perform said acts and to sell the real property herein concerned. Plaintiffs were of the same belief and went into possession of it and spent a considerable sum in its improvement.

As stated before, the court found generally that plaintiffs were the owners and in possession of the property; that defendants claim some title thereto adverse to plaintiffs but said claims are groundless and without right; that plaintiffs paid defendants $12,500 for it; that the sale was made by defendants in good faith and plaintiffs took possession of the land and improved it; that defendants now seek to deprive the plaintiffs of said land through a court of equity without offering to do equity, and that Sidney L. Beach created the situation of which he now, through his personal representative, seeks to take advantage, to the detriment of those who in good faith

parted with $12,500. Defendants were barred from ever asserting any claim to it.

It is not clear from the findings upon what basis or theory the court quieted plaintiffs' title to the property in question. Of course, if the Sidney L. Beach trust was lacking in capacity to become a grantee under the Clark deed, as contended by defendants, then plaintiffs' title under the quitclaim deed from the Clarks was sufficient to support the judgment in their favor. See Rixford v. Zeigler, 150 Cal. 435, 437 where it is said that "a deed of conveyance is void unless the grantee named is capable of taking and holding the property named in the deed; and the general rule also is that to make a deed effective the grantee must be a person, either natural or artificial, capable of taking and holding the property." See also Schade v. Stewart, 205 Cal. 658.

It might appear from the findings that it was upon the theory that defendants were estopped to question the validity and effect of the grant deed from the trustees under the circumstances related. There is some indication that the trust, in some respects, violated the rules of perpetuity.

The trust authorized the trustees to (1) "build up" the trust, to buy and sell any property for the benefit of the trust estate, and execute deeds accordingly; (2) the net income available for distribution was to be distributed in monthly or other convenient installments for the benefit of (A) Louise Grable, 51 per cent, or in case of her death to be distributed according to her will or to her heirs in case no will was left; (B) 49 per cent to be divided between the children of Louise Grable, after they became 25 years of age, with right of representation. It then provides that at the end of 25 years the trust shall cease

and the trust estate shall be distributed to a Sidney L. Beach Corporation to be subsequently formed and stock issued to the beneficiaries as follows: 51 per cent to Louise Grable, if living, and if not, to certain other persons; 49 per cent to her then living children and to the issue of any deceased child by right of representation.

It does not affirmatively appear that the ruling of the trial court in the Los Angeles action became a final judgment disposing of the claim here presented. Accordingly, it could not be set up as a final determination of the question presented in this action. Plaintiffs here were not parties to that action and were not necessarily bound by the memorandum opinion.

At the time of the creation of the trust Sidney L. Beach deeded considerable real property to said trust. The trustees, by the terms of the trust, were to accumulate an income trust fund and pay taxes and assessments on the property and also pay hospital and medical expenses of certain beneficiaries from that source. The real property here in question was subsequently purchased by the trustees and was soon thereafter sold by them for the purpose of "building up" the trust fund which source the distribution was to be subsequently made. There are many California cases upholding the validity of interim or prior estates regardless of the invalidity of future dispositions. They bear particularly around the fact of the spendthrift character of the trust and the courts generally find that the valid portions will be disturbed only if the elimination of the invalid provisions will defeat the entire purpose of the trust. (Estate of Troy, 214 Cal. 53; Estate of Gardiner, 45 Cal. App. 2d 559; Estate of Micheletti, 24 Cal. 2d 904; Otto v. Union National Bank, 38 Cal. 2d 233.)

The facts here reveal and these cases support the proposition that the Sidney L. Beach trust was, in any event, valid at the time of the execution of the grant deed in question. It authorized the trustees, for the 25 year term to buy and sell real property for the purpose of building up the trust, and in carrying out the spendthrift trust income provisions which are severable from the future disposition clauses. The profit from the sale of the property here in question became an interim estate of the trust and was distributable under its provisions which, at the time, were considered valid by all parties. The invalidity, if any, was discovered later and consisted of certain separable provisions in reference to the distribution of the remainder upon the happening of certain events or failure of such events to happen, and these claimed invalidities were not discovered by the parties until after the transaction in question had been completed in good faith. The trust received and retained the benefits of the full amount of the purchase price, and plaintiffs had been put in possession and had performed some improvment work on the property before the trustees ever questioned the validity of that transaction.

It is the rule that no agreement of the parties and no plea of estoppel can result in the creation or maintenance of an interest or estate which is prohibited by law, but there is authority for the statement that one may become estopped to question the acts of the past done with his consent, as in the expenditure or distribution of trust funds or, under the doctrine of *res judicata*, may have questions conclusively determines against him or by deed or transfer, or the like, may surrender all interest in property affected so as to have no standing to litigate anything in reference to it. (41 Am. Jur. 107, sec. 65;

Perpetuities and Restraints on Alienation, 70 C. J. S. 684, sec. 81.) See 162 A. L. R. pp. 162-163, where it is said: "Certain cases serve to emphasize the important difference between questioning past distributions of property or money, acquiesced in, and contesting limitations for the future." It is quoted from a cited case and said: "The substance of the ruling seems to be that the residuary legatee could not question what from time to time had been done, with his acquiescence, in the distribution of income, although upon discovery of the invalidity of the trust, and prior to its validity or invalidity having been determined, he could question the trust as to further acts of the trustees.

From our research it appears that the California courts have not had occasion to directly apply the doctrine of estoppel as to past acts in relation to such trustees. However, the cases are numerous where the estoppel doctrine has been applied in analogous cases. See Estoppel and Trust situations mentioned in 25 Cal. Jur. p. 216, sec. 84, where it speaks of comparative knowledge as the basis of responsibility:

"The evidence showing, in a suit to enforce the trust against the transferee, that the subject matter of the trust was transferred by the trustee to the defendants for a valuable consideration, and hence that loss must be borne by one of the parties, the situation permits of and requires an application of the fundamental rule which declares that where one of two more or less innocent parties must suffer a loss, the loss shall be borne by the party who had the better opportunity to foresee the dilemma and to prevent it from arising. . . ." (See also Crittenden v. McCloud, 106 Cal. App. 2d 42, 49.)

It appears to us that this is a situation where all the parties concerned may have innocently committed some error, if any error was committed, which alleged error was that, as a matter of law, the Sidney L. Beach trust violated, to some extent, the rule against perpetuities; that Beach created the trust ostensibly intending to creat a valid trust and to clothe the trustees with the power of sale; that plaintiffs relied upon Beach's creation and accordingly Beach or his trust should not be permitted to profit through the alleged mistake of law he made into which alleged mistake of law he had led the plaintiffs. No offer to return the purchase price is indicated. *A fortiori* the trustees have no legal or equitable grounds to deny the plaintiffs' title.

The record does not expressly show that the trial judge ruled on G. W. Grable's oral motion to abate the action due to the filing of the previous action in Los Angeles County. Suffice it to say plaintiffs here were not made parties to that action and under the reasoning here indicated plaintiffs were entitled to proceed with the present action without violating any comity rule. No prejudicial error resulted in this respect.

The court's ruling in granting attorney Reay's motion to "abate the cross-complaint pending determination upon further action" has confused us as to its effect. Assuming it refers to cross-complaint of Donald L. Grable, as administrator, against plaintiffs and cross-defendants G. W. Grable and wife, as trustees, and asuming that the order only deferred consideration of it until the rights of plaintiffs had been determined in the present action, it must be presumed, in support of the judgments entered, that the court fully considered the cross-complaint, and found against cross-complainants and in plaintiffs' favor in

respect to the issue presented. Its prayer was that it be declared that plaintiffs and cross-defendants hold title to the property only in trust for the estate and to have cross-complainants' title quieted accordingly.

It is true that the findings do not directly dispose of the issues presented by G. W. Grable's cross-complaint in which the Security Title Insurance Company is made a party defendant and in which cross-complainants claim they, as trustees, were entitled to $12,500 on the policy of title insurance issued to plaintiffs, because of the alleged invalidity of the title. Since the finding that the title was not invalid is sufficiently supported by the evidence, no relief could have been given in their favor on the cross-complaint. No prejudicial error resulted.

Decree affirmed.

GRIFFIN.

We concur:

BARNARD, *P. J.*

MUSSELL, *J.*